No. 170

In the

Supreme Court of the United States

OCTOBER TERM, 1957

CEPHAS E. SWORD and HOUSTON FIRE AND CASUALTY INSURANCE COMPANY,

Petitioners,

v.

GULF OIL CORPORATION,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Cephas E. Sword and Houston Fire and Casualty Company pray that a Writ of Certiorari issue to review the action and the judgment of the United States Court of Appeals for the Fifth Circuit, entered January 24, 1958. Petition for rehearing was denied April 23, 1958.

1.

OPINIONS OF THE COURT BELOW

The opinion of the Court of Appeals printed in Appendix A hereto is reported *251 Fed. 2d 829.*

2.

JURISDICTION

The judgment of the Court of Appeals was entered January 24, 1958. Rehearing was denied on April 17, 1958. The jurisdiction of this Court is invoked under Article 28, U. S. C., Sec. 1254(1).

3.

QUESTIONS PRESENTED

I.

Whether a Court of Civil Appeals may, in rendering its judgment in a diversity case, apply substantive law which is in direct conflict with the law of the State from which the case was appealed as declared by the Supreme Court of the state?

II.

Whether a Circuit Court of Appeals may affirm the judgment of the trial Court rendering a summary judgment in a case where the evidence raised issues of fact for the jury without denying to petitioner a trial by jury as required by the Seventh Amendment to the Constitution of the United States?

III.

Whether the United States Supreme Court will permit local law as determined by a Circuit Court of Appeals to control over the right of trial by jury as guaranteed by the Seventh Amendment to the Constitution of the United States?

IV

Whether the Court erred in holding that under the law of Texas that the doctrine of inherently dangerous work does not inure to the benefit of the employee of the contractor?

V.

Whether the Court erred in holding that the trial court was correct in entering its summary judgment for the appellee Gulf Oil Corporation, in this cause?

VI

Whether the Court erred in granting a motion for summary judgment after the motion for instructed verdict had been overruled by the Court and after the jury had failed to reach a decision. A new trial should have been ordered by the trial court?

VII

Whether the Court erred in holding that, under the circumstances here involved, that it was not the duty of Gulf Oil Corporation to inspect the work as it progressed to see if they had furnished reasonably safe place to work to their invitee, Sword?

4.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

1. The Constitutional provisions involved in this case is the Seventh Amendment to the Constitution of the United States reading as follows:

> "In suits at common law, where the value in controversy shall exceed $20.00, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

2. The statutory provison involved in this case is the Rules of Decision Act, *28 U. S. C., Sec. 1652* which reads as follows:

> "The laws of the several states, except where the Constitution or treaties of the United States or acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the Courts of the United States, in cases where they apply."

STATEMENT

This is a diversity of citizenship case filed for serious injuries to Cephas E. Sword. Sword was an invitee upon the premises by virtue of being an employee of a contractor employed by Gulf Oil Corporation. The Circuit Court of Appeals, in its opinion describes the situation correctly with the exception that they failed to point out that Gulf under its contract reserved the right to see that the work

was performed with maximum safety, and they correctly held that the evidence was sufficient to show that had an inspection been made the absence of the guard from the master clutch could have been made in time to have avoided Sword's loss of his leg.

In Petitioner's motion for rehearing the following points were urged and are here now presented to this honorable Court as controlling the disposition of this petition in the determination of the above presented questions as set out under heading 3 of this petition.

That the 5th Circuit Court erred in holding that such control as Gulf retained was not sufficient to create a duty of inspection upon the part of Gulf. A recent case which petitioners discovered, following the rendition of the Opinion, as *Berquist v. Penterman, 134 Atlantic Reporter 2d, Pg. 20*, petition for certiorari in this case was denied by the Supreme Court of New Jersey; *134 Atl. Rep. 2d 832*, this case together with the Supreme Court of Texas decisions, particularly the *Genecov* and *Henger* cases, establish the right to certiorari. The Circuit Court has refused to discuss these cases and has said that they require *ar actual* control of the operation or a reserved right of control *more than* that deemed necessary to secure the said completion of the work.

In this case, the Circuit Court has refused to admit that Gulf, *occupied*, by virtue of the terms of its written contract, the position of *general contractor* or a coordinator or supervisor of the activities of the various contractors in such a manner as to *cast* upon it the *duty of inspection*.

The Circuit Court, however, has, *by express implication*, recognized that *Gulf was a coordinator* of the activities here involved in the following language:

> "It was desirable also for the protection of other persons who might come on the premises at Gulf's invitation, before the completion of the drilling, such as employees of companies specializing in drill stem testing, cementing, perforating well casing, casing testing, coring, acidizing, and other well services."

The holding that Gulf could reserve and did reserve *the right of inspection to provide a safe place for these specialty companies that Gulf*, as owner, *made direct contracts with, for various portions of the work as the drilling of the well progressed and as is shown by the terms of the contract*, is all that is required to make Gulf such a supervisor and coordinator as we have in the above three leading cases on this subject.

The Court apparently holds that Gulf was under a duty, which Gulf unquestionably was, to these people to exercise the duty of inspection to see that the place so furnished was reasonably safe. It is a matter of deep concern to Petitioners that the Circuit Court would refuse to discuss the real point urged here when same is so clearly supported by the Restatement of the Law of Torts, James and Harper's work on Torts published in 1957, and the settled law in Texas as declared by the Supreme Court of Texas in *Smith v. Henger, 226 S. W. 2d 425* and *Roosth & Gencov Production Company v. White, 262 S. W. 2d 99.*

Mr. Justice Rives seems to feel that it would be disastrous if the prediction of Dean Prosser came true that

ultimately the general rule will be that the employer is liable for the negligence of an independent contractor. However, this could never happen in many situations. We are concerned here not *with the rule, but with the exception:*

May it here be said that when one becomes a coordinator of activities and reserves a certain portion of control of the work, as did Gulf in this case, that this does not destroy the simple *employer-employee* relationship, *but simply engrafts and adds an additional exception* to the general rule that an employer is not generally liable for the negligence of an independent contractor.

The mere fact that the New Orleans Court disagrees with the holdings in the Texas cases is no reason for their *refusing* to *discuss the real point in this case* or *the real exception here involved.* The minority view expressed by Chief Justice Hutcheson in the *Wright* case has apparently now become the majority view of this Court, thus repudiating without logical excuse or explanation the many great opinions of the 5th Circuit upon this question, and in effect destroying all third party actions.

It is true that plaintiff waived his right of action at common law against his employer under the terms of the Workmen's Compensation Act, but *it was never intended that he should waive his cause of action against the employer of his employer in exceptional cases or in cases that come under the exceptions to the general rule, such as the case at bar.*

The Honorable Circuit Court of Appeals erred in holding in this case that under the law of Texas the employee of the independent contractor is not entitled to the protection of the inherently dangerous doctrine. The cases relied upon are *Union Tank & Supply Company v. Kelley, Cagle v. McQueen* and *Humble Oil & Refining Company v. Bell, 180 S. W. 2d 170.* The *Bell* case relied upon in the *Kelly* and *McQueen* cases was never authority for anything in Texas, save special employee, in that the Supreme Court of Texas wrote an opinion saying that the only reason that the writ was denied was that Bell *was a special employee of Humble.*

Since that time, our Texas courts have recognized that the doctrine of inherently dangerous work does inure to the benefit of the employee in later cases than the Bell case in which writs have been refused. The Supreme Court of Texas so held in *Lloyd v. Herrington, 182 S. W. 2d 1003*, and writ was denied in the case of *Texas Electric Service Co. v. Holt, 249 S. W. 2d 664 (Ft. Worth Court of Civil Appeals).*

Again, we respectfully point out that the case of *Nance Exploration Company v. Texas Employers' Insurance Association, 305 S. W. 2d 621*, is still pending before the Supreme Court, on motion for rehearing of the application of writ of error in this case. However, under the Texas system of writ of error, if the motion is overruled the refusal of the writ by the N. R. E. route, would not mean that the Supreme Court of Texas *approves* of the holding of the El Paso Court on this *one point* since there are *many other points* involved in the case.

The Circuit Court erred in holding under all of the facts, that the evidence in this case would not support a finding that Gulf owed any duty to Sword to inspect and to supervise the operation of the machinery furnished by Sword's employer.

The Circuit Court further erred in holding in its Opinion, on Page 7, as follows:

> "The appellants do not complain of the Court's failure to reserve its decision on the Motion for directed verdict as suggested in Rule 50(b), Federal Rules of Civil Procedure. See Slocum v. New York Life Ins. Co., 1913, 228 U. S. 364, 381, commented on in 2 Moore's Federal Practice, 2nd ed., Paragraph 2.04, pp. 326, 327, and 5 Id., Paragraphs 50.01 (8), 50.07, and 50.10."

We would respectfully point out that the petitioners did complain in Point No. 21 and Point No. 22 of the Court's error in entering judgment in this cause based upon the defendant's motion for summary judgment and of the Court's error in entering judgment in this cause based upon the defendant's motion for instructed verdict as filed in this cause at the close of all evidence in the case and we respectfully submit that such point was sufficient to raise the judicial question that the Court had no right to grant either the instructed verdict or the summary judgment after having submitted this cause to the jury in that the Supreme Court of the United States held in the *Slocum* case, supra, that such a practice violated the Seventh Amendment guaranteeing jury trials at common law or as stated in the text cited by the opinion.

> "It followed that, if a motion for directed verdict was erroneously overruled and a verdict improperly

had in Federal Court, neither the trial nor appellate court could set aside the verdict and enter a proper verdict but was obligated to grant a new trial."

In our Supplemental Brief filed before the 5th Circuit Court, petitioners alleged under Point No. 25 as follows, to-wit:

"The appellant was denied due process of law as guaranteed by the Seventh Amendment since, by the action of the Court, he is deprived of trial by jury."

It is therefore respectfully submitted that the only thing that this Honorable Court has jurisdiction to do is to reverse and remand this cause for a new trial on the merits thereof.

The honorable Circuit Court of Appeals states in footnote 2, "So far as we can discern the drilling report did not inform Ingle or Gulf of a continued absence of a guard over the open side of the master clutch."

However, Ingle, Gulf's representative on the job, admitted that he knew on July 3rd, 1952, about 2½ months before the accident, that the master clutch had to be repaired (R. 164), and Ingle flatly admitted that if a master clutch gets out of line, it represents a serious and dangerous thing to the rig if it is not properly repaired. (R. 166.)

The witness Raymond Knox, who was a driller representative for Gulf for many years and occupied the same position as Ingle, testified that on jobs where he was acting as Gulf's representative he had instructions from Gulf to make inspections of the equipment to see if it was adequate and to determine if maximum safety precautions

had been taken and observed, and that during the years that he was with Gulf that he would from time to time discover dangers, and have them corrected by Gulf. (R. 131.)

This evidence clearly proves that there was plenty of time for Ingle to have discovered the missing guard and have something done about it.

It clearly raised a fact issue as to Gulf's duty of inspection.

It must be borne in mind that under the Supreme Court of Texas decision in *Smith v. Henger, 226 S. W. 2d 425*, expressly held that it made no difference who created the danger, that it was the duty of one situated as Gulf to make inspections for the purpose of remedying the defects.

6.

REASONS FOR GRANTING WRIT

1. The decision of the Court of Appeals is not in accord with the applicable decisions of the Supreme Court of Texas.

The holdings complained of under the preceding statement are in direct conflict with the Supreme Court of Texas decisions on this subject hereinabove and hereinafter set out, including the additional Texas Supreme Court decision of *McKee General Contractor v. Patterson, 271 S. W. 2d 391*, which held that the duties of inspection to

make and *keep* the premises reasonably safe was upon one occupying the states of Gulf in the case at bar.

Since the Court of Civil Appeals did not follow the law of Texas a typical situation is presented in which this Honorable Court has on a number of occasions granted writs of certiorari.

Erie R. Co. v. Tompkins, 304 U. S. 64;

Russell v. Todd, 309 U. S. 280;

Whichita Royalty Co. v. City National Bank, 306 U. S. 103;

Guaranty Trust Co. v. York, 320 U. S. 99.

See also *Rules of Decision Act, U. S. C., Section 1652.*

Certiorari was also apparently granted by this Honorable Court for this reason in *Phillips Petroleum Co. v. Gibson, 232 Fed. 2d 13, 1 L. Ed 2d 77.*

The granting of the writ by this Honorable Court in the *Gibson* case was a matter of great significance to the legal world and to all litigants in personal injury suits of the character here involved.

Following the decision of this Honorable Court in the *Gibson* case, supra, the United States Court of Appeals for the Ninth Circuit said:

> "In considering a case of this kind we should take note of the precedents established by the Supreme Court when it is proper to take a case from the jury. For although, this is a diversity case, it was tried in a federal court where considerations relating to the Seventh Amendment must prevail." *Smith v. Buck, 245 Fed. 2d 348.*

Citing with approval *Gibson v. Phillips Petroleum Co., 352 U. S. 874* and *Reynolds v. Pegler, 223 Fed. 2d 429.*

Professor Leon Green in an illuminating article entitled:

"Protection of Jury Trial in Diversity cases." June, 1957 Texas Law Review has this to say about the action of this Honorable Court in the *Gibson* case, supra:

> "The conclusion is that the Supreme Court was not willing to go along with the Texas Court in the determination of this issue as a matter of law by virtue of the local doctrine.
>
> "No doubt the controlling matter here is the attitude of the Supreme Court towards the protection of jury trial under the 7th Amendment. The doctrine of the Texas Court is a transparent device to syphon off the powers of the jury by converting a question of fact into a question of law."

On page 770 Professor Green continues:

> "Thus, under the Supreme Court decision it would seem that when the right of jury trial in the federal court collides with Erie v. Tompkins, the Supreme Court as in the F. E. L. A. cases will stick with jury trial and not allow practices of any type designed to deprive a litigant of his Constitutional right."

Citing *Dice v. Akron C. & Y. R.R., 342 U. S. 359*, and *Brown v. Western Ry. Co., 338 U. S. 294.*

Professor Green continues, page 770:

> "How far the Supreme Court is prepared to go in protecting jury trials in common law cases in the federal courts against state court invasions is an interesting question, and one highly important to litigants in the area of personal injuries."

Professor Green of the law faculty of the University of Texas agrees with the action of this honorable court in the *Gibson* case with these remarks:

> "In Texas, especially by virtue of its complex proximate cause and negligence per se doctrines, buttressed by intricate and numerous special issues, jury trial has been greatly impaired." Citing *Arnold v. Panhandle & Santa Fe Ry. Co., 77 Sup. Ct. 840.*

2. The action of the Court of Appeals constituted an invasion of the province of the jury contrary to the Seventh Amendment of the United States Constitution.

E. G. Ives v. Grand Trunk R. Co., 638 S. Ct. 1077, 319 U. S. 372;

Schulz v. Pennsylvania R. Co., 76 Sup. Ct. 134 and 608.

3. The questions here presented have great importance and far-reaching effect.

There are hundreds of thousands of industrial workers not only in Texas but elsewhere who will be denied protection and go uncompensated for their personal injuries if the rule announced by the Circuit Court is permitted to stand.

It is quite obvious that the Circuit Court could not explain away their prior decisions nor could they explain in any definite manner why the Texas cases relied upon were not in support of petitioners' theory.

Such a general statement of the law appears to be one supported only by the immediate whim and caprice of the

Circuit Court and should not be permitted to stand in a federal court of justice in defiance of petitioners' constitutional right to trial by jury as well as the rights of those many thousands of seriously injured workmen who will likewise be denied their day in court.

It has long been the settled law of Texas that it is the duty of a general contractor or occupant of land, or owner and invitor, such as Gulf, to exercise ordinary and reasonable care to furnish the employee of the independent contractor coming upon the premises to work, a reasonably safe place in which to work. It is further the established law of Texas that this duty to furnish a safe place carries with it, in addition, a duty to warn an invitee such as Sword of any danger of which the invitee is unaware and of which the invitor, such as Gulf, has actual knowledge or could, in the exercise of ordinary care, have discovered and had actual knowledge of.

It is the plain holding of our Texas Courts that the invitor, occupant of land or general contractor, such as Gulf, *all of whom in Texas occupy the same relationship with respect to the duties owed an invitee, must make an inspection of the premises to determine whether or not the place that the invitee is working is reasonably safe* and further, thereafter, as the work progresses he must make further inspections to keep the place where the work is being performed reasonably safe. The Fifth Circuit did, heretofore in prior opinions, adhere to this rule, but now, for the first time, the Fifth Circuit has repudiated all of these holdings, not only of their own, but of the Supreme Court of Texas,

as well as the decisions of this Court, and held that an actual control of the work in question is necessary before the one such as Gulf can be liable. They have further mistakenly held the doctrine of inherently dangerous work does not inure to the benefit of the employee.

The above holdings of the Circuit Court in this case are in direct conflict with the following decisions:

Gulf Oil Corporation v. Wright, 236 Fed. 2d 46 (5th Circuit);

Sun Oil Company v. Pierce, 224 Fed. 2d 580 (5th Circuit);

United Production Corp. v. Chesser, 107 Fed. 2d 850 (5th Circuit);

Amacker v. Skelly Oil Company, 132 Fed. 2d 431 (5th Circuit);

Roosth & Genecov Production Co. v. White, 152 Tex. 619, 262 S. W. 2d 99 (Supreme Court of Texas);

Smith v. Henger, 148 Tex. 456, 226 S. W. 2d 425, 20 A. L. R. 2d 853 (Supreme Court of Texas);

Texas Electric Service Co. v. Holt, 249 S. W. 2d 664 (Texas Court of Civil Appeals);

Wright v. Tudor City 12th Unit, Inc., et al., 12 N. E. 2d 307;

Phillips Petroleum Co. v. Gibson, 232 Fed. 2d 13, 1 L. Ed. 2d 77 (Supreme Court of the United States).

It is further quite apparent that under the decision in *Slocum v. New York Life Insurance Company, 228 U. S. 381*, the trial court had jurisdiction only to grant a new trial.

The law involved in this case is substantially the same as in the case of *Glen Hubbard Hurst, et al. v. Gulf,* in which a petition for certiorari is now being prepared.

For the purposes of brevity, reference is here made to a discussion of the law involved as discussed in the brief supporting the petition for certiorari in the *Hurst* case.

WHEREFORE, your petitioners respectfully pray this Honorable Court to grant the petition for writ of certiorari to the end that on review the Circuit Court may be directed to reverse its judgment.

Respectfully submitted,

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A separate Certificate of Service as required will be furnished by counsel.

APPENDIX A

CEPHAS E. SWORD AND HOUSTON FIRE AND CASUALTY INSURANCE COMPANY, *Intervener*,
Appellants,

versus

GULF OIL CORPORATION,
Appellee.

No. 16357

United States Court of Appeals

FIFTH CIRCUIT

January 24, 1958

Action for injuries sustained in operation of a well. Defendant's motion for directed verdict was denied and thereafter defendant's motion for judgment notwithstanding the verdict and for summary judgment were granted by the District Court for the Western District of Texas, R. E. Thomason, J., and the defendant appealed. The Court of Appeals, Rives, Circuit Judge, held, inter alia, that in action against employer of independent contractor engaged to drill exploratory oil well under contract which provided that in performance of work contractor was independent

contractor with authority to control and direct performance of details of work and that employer was interested only in results obtained and which provided that work be subject to general right of inspection to secure satisfactory completion, evidence included showing that no employee of employer was present at time of accident when independent contractor's employee's foot and leg gas caught in rapidly revolving clutch of rig and that employee was not working under supervision or direction of any employee of employer was insufficient for jury on issue whether employer itself owed duty of inspection which would have disclosed absence of guard over the clutch.

Affirmed.

1. Master and Servant Key 318(2)

Where contract between owner of oil and gas lease and drilling company provided that in performance of work company was independent contractor with authority to control performance of details of work and that lease owner was interested only in results but that work should meet approval of owner and be subject to general rights of inspection to secure a satisfactory completion of well, the degree of right of supervision and control by owner was not inconsistent with relationship between owner and its independent drilling contractor as such and did not impose on owner any direct duty to employees of independent contractor in absence of actual control of operation by owner or its employees.

2. Workmen's Compensation Key 352

If owner of oil and gas lease had retained authoritative, not merely supervisory, right of control over well-drilling contractor as to means and manner of performing work as well as ultimate results, then independent contractor's employee who was injured because of unguarded clutch would be an employee of oil and gas lease owner within Texas Compensation Act. Vernon's Ann. Civ. St., art. 8306, et seq.

3. Master and Servant Key 318(2)

An employer of independent contractor does not owe a duty to contractor's employees to inspect machinery furnished by contractor, in absence of actual control of the operation, or of any reserved right of control more than that deemed necessary to secure satisfactory completion of the work.

4. Master and Servant Key 319

Where contract between drilling company and owner of oil and gas lease made it duty of company to take safe precautions and to provide for use by company's employees all safety appliances needed for maximum protection against injuries, oil and gas lease owner could not be held liable for injuries to contractor's employee on theory that work was inherently dangerous and that owner owed duty of reasonable care for taking of such precaution.

5. Master and Servant Key 319

Employer's duty, in cases of inherently dangerous work, is nondelegable as to third persons, but duties which con-

tractee owes to employees of independent contractor are less than those owing to third persons.

6. Courts Key 365(22)

The federal court must look to Texas courts for statements of public policy of that state with regard to employer's liability for injuries to independent contractor's employee.

7. Master and Servant Key 319

Under Texas law, the rule that employer of an independent contractor is liable to third persons for negligence of independent contractor in performance of work inherently dangerous does not extend to employees of independent contractor.

5. Master and Servant Key 319

Alleged fact that drilling of exploratory well was inherently dangerous would not impose liability upon owner of oil and gas lease which had contracted with drilling company for drilling of well for injuries to company's employee because of absence of guard on rapidly revolving clutch of rig which was in charge of company's crew.

9. Courts Key 405(16-10)

Where rulings on admissibility of evidence were not included either in statement of points on which appellants intended to rely on appeal that were served on appellee, or in specifications of error in appellants' original brief, and such rulings did not constitute plain error affecting sub-

stantial rights which would require reversal of judgment in interest of justice, such rulings would not be reviewed. Fed. Rules Civ. Proc. rule 75(d), 28 U. S. C. A.; U. S. Ct. App., 5th Cir., rule 24, subd. 2(b), 28 U. S. C. A.

10. Master and Servant Key 332(3)

In action against employer of independent contractor engaged to drill exploratory oil well under contract which provided that in performance of work contractor was independent contractor with authority to control and direct performance of details of work and that employer was interested only in results obtained and which provided that work be subject to general right of inspection to secure satisfactory completion, evidence including showing that no employee of employer was present at time of accident when independent contractor's employee's foot and leg got caught is rapidly revolving clutch of rig, and that employee was not working under supervision or direction of any employee of employer was insufficient for jury on issue whether employer itself owed duty of inspection which would have disclosed absence of guard over the clutch.

John J. Watts, W. O. Shafer, Odessa, Tex., for appellants.

William L. Kerr, Turpin, Kerr & Smith, Midland, Tex., of counsel, for appellee.

Before HUTCHESON, Chief Judge, and RIVES and WISDOM, Circuit Judges.

RIVES, Circuit Judge.

The question presented is whether, under the evidence, a jury could properly hold the employer of an independent contractor liable for injury to one of that contractor's employees. The injury was caused by the absence of a guard over a rapidly revolving clutch into which the left foot and leg of the employee were sucked and so badly mangled that amputation was necessary. Specifically, the question is whether there was sufficient evidence to sustain a finding that the employer of the independent contractor owed to the contractor's employee a duty of inspection and control, which would have resulted in the discovery and repair of the defect, or in warning the employee of the absence of the guard.

Gulf was the owner of an oil and gas lease covering "flat ranch land." It contracted with Hall & Stewart Drilling Company for the drilling of an exploratory well. The contract was on a printed form, some of the pertinent provisions of which are quoted in the margin.[1]

[1]"This contract made and entered into on this *9th* day of *January, 1952*, between Gulf *Oil Corporation* * * *, hereinafter called 'Gulf', and *Hall & Stewart Drilling Company* * * * hereinafter called 'Contractor.'

(Continued on Next Page)

The contractor furnished the workmen, derrick, engines, motors and machinery. The well had been drilled to a depth of more than 13,000 feet. Sword was a member of a five-man crew working for the drilling contractor. In searching for air leaks which had caused a pressure failure, Sword started over the master clutch, his left foot slipped and was sucked into the clutch with the resultant injury.

(Footnote Continued)

"Witnesseth:

"1. Location of Well:

"Gulf is in possession and control of a certain tract of land situated in *Upton County, Texas* * * * upon which it desires Contractor to drill a well for oil or gas, * * *.

* * * * * *

"8. Safety Precautions:

"Contractor agrees to do all things possible to control and prevent blowouts.

"Contractor agrees to inspect all material furnished by Gulf before using same and to notify Gulf of any defects therein.

"Contractor shall maintain well control equipment in good condition at all times; shall test the blowout preventers at least once each tour by closing the rams; and shall test the master gate valve by closing same each time the drill pipe is pulled.

"Gulf shall have the right to specify to Contractor the design of the surface mud system and control equipment, which are to be approximately as shown on drawing attached to and made a part of Exhibit 'A'. At any and all times during the drilling of this well, the drilling fluid must be of a type and of characteristics acceptable to Gulf, and Gulf shall have the right to make any tests of the drilling fluid which it deems necessary. Drilling with water may, at certain predetermined depth intervals, be acceptable to Gulf; however, it is specifically understood that when and if Contractor elects to so drill, Contractor shall be responsible for any trouble or damage resulting therefrom. In the event the water so used is furnished by Gulf, Gulf shall have the right to require Contractor to discontinue drilling with water and to drill with a low-water-loss mud should Gulf's water supply prove inadequate.

"Contractor shall measure the total length of drill pipe in service, with a steel tape, at approximately each 1,000-foot depth interval and shall also take measurements just before setting casing or liner, and at point where day rate begins, and after reaching final depth.

"Contractor shall provide and have available at all times for use by Contractor's employees engaged in the performance of the work herein undertaken, all safety appliances needed for the maximum protection of Contractor's employee's [sic] against injuries.

"With respect to any work to be performed hereunder, which is to be paid for at day rates, Gulf shall have the right to specify to Contractor the general technique to be employed by Contractor in the performance of all such work; but the actual performance and superintendence of the details of such work shall be by Contractor. While Contractor is operating on day rate basis in the performance of this contract, he shall not be responsible for loss or damage to Gulf's property on the location, nor

(Continued on Next Page)

The master clutch was enclosed on all sides but one. The open side was not easily visible, being only about a foot away from the compound chain guard. Sword's testimony and that of his witnesses went to show that it was customary to have a guard over the open side of the master clutch, made of "a heavy gauge wire mesh so that the air can get to the clutch and it will serve as a guard for a hand or foot to keep out of there." It was undisputed that such a guard would have prevented Sword's injury.

Sword was an experienced roughneck who had been working at this well for about a month. He had not been warned, and did not know that the guard was missing. A very careful inspection was necessary to discover the defect. Mr. King, the driller member of the crew, testified that "I hadn't been working on that rig but about I believe about

---

(Footnote Continued)

for loss or damage to any tubular or other equipment ordinarily used below the surface, unless such loss or damage shall be caused by the negligence of the Contractor. Gulf will reimburse Contractor at a reasonable value for Contractor's equipment lost in the hole when not occasioned by the negligence of the Contractor.

* * * * *

"19. Independent Contractor Relationship:

"In the performance of the work herein contemplated Contractor is an independent contractor, with the authority to control and direct the performance of the details of the work, Gulf being interested only in the results obtained. But the work contemplated herein shall meet the approval of Gulf and be subject to the general right of inspection herein provided to Gulf to secure the satisfactory completion thereof. * * *.

"Gulf Representatives' Status:

"The actual performance and superintendance of all work hereunder shall be by Contractor, but Gulf shall be privileged to designate a representative or representatives, who shall at all times have access to the premises for the purpose of observing tests or inspecting the work performed by Contractor, and who shall have the right of determining whether such work is being performed by Contractor in accordance with the provisions of this contract. Such representative, or representatives, shall be empowered to act for Gulf in all matters relating to Contractor's performance of the work herein undertaken. * * *."

two months. * * * And, as far as I know, that guard was never on there from the time I went to work on it." King's attention had been called to the absence of the guard by another, but less serious, accident.

> "Well, one of the roughnecks on the crew dropped a wrench on this clutch, and it broke off an air connection in there. We had to shut the rig down and repair this clutch, and I helped make the repairs on it."

King further testified that he reported that matter to his "tool pusher," Underwood, and that it was included in a written drilling report signed by H. E. Ingle, Gulf's Area Drilling Foreman.

Mr. Ingle was the only representative of Gulf "assigned to that well to do any work about it in this stage of the operations where he received his injuries." He had never made any inspection of the master clutch or of the condition of any of the equipment or tools being used by the contractor. He admitted having signed a drilling report on July 3, 1952, about two and one-third months before the accident, containing the statement that the crew of which Mr. King was driller had to repair the master clutch air line,[2] but explained, "It says that on the report. but it was of no concern of mine." On cross-examination, Mr. Ingle testified in part:

> "Q. Yes. Now, during your twenty-three years with the Gulf, they have been letting drilling contracts and having you on the job for them as company representative how long? A. Nine years.
>
> "Q. Nine years? A. Yes.

[2]So far as we can discern, the drilling report did not inform Ingle or Gulf of a continued absence of a guard over the open side of the master clutch.

"Q. And they never have changed the rules any with reference to their instructions to you, have they? A. No, sir.

"Q. Mr. Raymond Knox, that's out there in the witness room, he occupied the position down there in Crane County as drilling foreman on the job before you ever went down there, didn't he, for the Gulf? A. Yes, sir.

"Q. And you know that all during the time that the Gulf has given instructions to company foremen to inspect equipment on jobs such as this, including the master clutch and other conditions in order to see if the place that those men are working on Gulf oil wells are safe, don't you? * * * A. I have never been instructed to inspect any equipment of the contractors by the Gulf Oil Corporation.

"Q. And you have been instructed as a drilling foreman for the Gulf during those years that if there is any dangerous condition, such as this thing would be, to order the contractor to repair it, haven't you? A. I said I never have been instructed to inspect any equipment hired by the contractor nor to order any of it to be repaired."

In rebuttal the plaintiff introduced Raymond Knox, who testified that he left Gulf's employment as its drilling foreman in 1951, and further:

"Q. Mr. Knox, during the years that you were a drilling foreman acting as a company representative for the defendant in this case, Gulf Oil Corporation, on jobs wherein they had drilling contractors carrying on the work, did the Gulf give you instructions to inspect the equipment on those rigs, and in the event any unsafe condition was found and objections such as the master clutch being without a guard, to order the drilling contractor to make the necessary changes? A. They did."

The district court denied Gulf's motion for a directed verdict. After hours of deliberation, the jury reported that they were in hopeless deadlock, and were then discharged. Thereafter, Gulf moved for judgment notwithstanding the verdict and also for summary judgment, and the court granted both motions and entered judgment for the defendant.[3]

Appellants do not argue that Gulf is vicariously liable for the tort of its independent contractor. Their position is that it was a question for the jury, under the facts and circumstances of the case, as to whether Gulf itself owed a duty of inspection which would have disclosed the absence of the guard over the clutch.

[1] As has been noted, footnote 1, *supra*, the contract provided that in the performance of the work the contractor was an independent contractor with the authority to control and direct the performance of the details of the work, and that Gulf was interested only in the results obtained. The contract continued: "But the work contemplated herein shall meet the approvel of Gulf and be subject to the general right of inspection herein provided to Gulf to secure the satisfactory completion thereof." That degree of right of supervision and control was clearly reserved for the benefit of Gulf itself, in its legitimate concern for the protection of its investment and properties and the satisfactory completion of the well. It was desirable

[3] The appellants do not complain of the court's failure to reserve its decision on the motion for directed verdict as suggested in Rule 50(b), Federal Rules of Civil Procedure, 28 U.S.C.A. See Slocum v. New York Life Ins. Co., 1913, 228 U.S. 364, 381, 33 S.Ct. 523, 57 L.Ed. 879, commented on in 2 Moore's Federal Practice, 2nd ed., Paragraph 2.04, pp. 326, 327, and 5 Id., Paragraphs 50.01(8), 50.07, and 50.10.

also for the protection of other persons who might come on the premises at Gulf's invitation before the completion of the drilling; such as employees of companies specializing in drill stem testing, cementing, perforating well casing, casing testing, coring, acidizing, and other well services. That degree of right of supervision and control was not inconsistent with the relationship between Gulf and its independent drilling contractor as such, and did not impose on Gulf any direct duty to the employees of its independent contractor, in the absence of actual control of the operations by Gulf or its employees.

The evidence was without dispute that no Gulf employee was present at the time of the accident; that Sword "hadn't seen a Gulf man in several days before the time you got hurt," and that Sword was not working under the supervision or direction of any Gulf employee. There was no actual control by Gulf that had any relation to Sword's injury.

[2] If Gulf had retained authoritative, not merely supervisory, right of control over the well-drilling contractor as to means and manner of performing the work as well as ultimate results, then Sword would be an employee of Gulf within the Texas Workmen's Compensation Act, Vernon's Ann. Civ. St., art. 8306, et seq.; [4] and Sword has, of course, already been paid compensation by the intervener appellant. Able counsel for the appellants do not claim such a degree of control or a right thereof as would constitute Sword an employee of Gulf, but insist that the lesser degree

[4] Standard Ins. Co. v. McKee, 1947, 146 Tex. 183, 205 S.W.2d 362, 363, 364.

of control reserved did impose on Gulf a duty to Sword within the principle stated in the Restatement of Torts, § 414, quoted with the comment thereto in the margin.[5]

Appellant relies especially upon the many Texas cases cited in the opinion by Judge Brown in Gulf Oil Corporation v. Wright, 5 Cir., 1956, 236 F. 2d 46, and supporting the principle stated at page 52:

> " * * * The relationship under Texas law between an occupier of land and his invitees (including employees of an independent contractor) and between a general contractor and employees of subcontractors is the same, Roosth & Genecov Production Co. v. White,

[5] "§ 414. Negligence in Exercising Control Retained by Employer.

"One who entrusts work to an independent contractor, but who retains the control of any part of the work, is subject to liability for bodily harm to others, for whose safety the employer owes a duty to exercise reasonable care, which is caused by his failure to exercise his control with reasonable care.

"*Comment:*

"a. If the employer of an independent contractor retains control over the operative detail of doing any part of the work, he is subject to liability for the negligence of the employees of the contractor engaged therein, under the rules of that part of the Law of Agency which deals with the relation of master and servant. The employer may, however, retain a control less than that which is necessary to subject him to liability as master. He may retain only the power to direct the order in which the work shall be done or to forbid its being done in a manner likely to be dangerous to himself or others. Such a supervisory control may not subject him to liability under the principles of Agency, but he may be liable under the rule stated in this Section unless he exercises his supervisory control with reasonable care so as to prevent the work which he has ordered to be done from causing injury to others.

"b. The rule stated in this Section is usually, though not exclusively, applicable when a principal contractor entrusts a part of the work to subcontractors but himself or through a foreman superintends the entire job. In such a situation, the principal contractor is subject to liability if he fails to prevent the subcontractors from doing even the details of the work in a way unreasonably dangerous to others, if he knows or by the exercise of reasonable care should know that the subcontractors' work is being so done and has the opportunity to prevent it by exercising the power of control which he has retained in himself. So too, he is subject to liability if he knows or should know that the subcontractors have carelessly done their work in such a way as to create a dangerous condition and fails to exercise reasonable care either to remedy it himself or by the exercise of his control cause the subcontractor to do so." Restatement, Torts, § 414, pp. 1120-22.

152 Tex. 619, 262 S. W. 2d 99; Smith v. Henger, 148 Tex. 456, 226 S. W. 2d 425, 20 A.L.R. 2d 853, and gives rise to a like duty, 'Accepting * * * the status of the plaintiff * * * as that of business invitee, the defendant owed him a duty to use reasonable care to make and keep the premises reasonably safe for his use * * *', Triangle Motors of Dallas v. Richmond, 152 Tex. 354, 258 S. W. 2d 60, 62; Hall v. Medical Building of Houston, 151 Tex. 425, 251 S. W. 2d 497; Smith v. Henger, supra; Renfro Drug Co. v. Lewis, 149 Tex. 507, 235 S. W. 2d 609; Weingarten, Inc., v. Brockman, 134 Tex. 451, 135 S. W. 2d 698; McKee v. Patterson, 153 Tex. 517, 271 S. W. 2d 391, 393 * * *."[6]

Particular attention is called to the decisions of the Supreme Court of Texas in Smith v. Henger, 1950, 148 Tex. 456, 226 S. W. 2d 425, 430, 431, 20 A. L. R. 2d 853; Roosth & Genecov Production Co. v. White, 1953, 152 Tex. 619, 262 S. W. 2d 99, 101; and Robert E. McKee, General Contractor v. Patterson, 1954, 153 Tex. 517, 271 S. W. 2d 391, 395.

[3] This opinion would be extended unreasonably, and no useful purpose would be served, by a discussion of the many Texas decisions, or of those from this Court, relied on by the respective parties. It is sufficient to note that none of them goes so far as to hold, or to support a holding, that an employer of an independent contractor owes a duty

[6] Insofar as the possession of the land may be concerned, it was stipulated:

"* * * that the Gulf Oil Corporation was the owner of an oil and gas lease when it entered into the contract that was made with Hall & Stewart, and that when it delivered possession of its oil lease to the contractor it delivered to him a flat piece of land, on which the drilling of the well commenced and was carried to the point at which the accident happened."

Of course, the possession delivered to the contractor was not exclusive of Gulf and its employees and invitees.

to the contractor's employees to inspect the machinery furnished by the contractor, in the absence of any actual control of the operation, or of any reserved right of control more than that deemed necessary to secure the satisfactory completion of the work.[7]

[4] As another basis of liability, the appellants urge that the work was inherently dangerous in the absence of special precautions; and that the employer of the independent contractor, charged with so foreseeing, owed a duty of reasonable care for the taking of such precautions. Assuming, without deciding, that this is a case of inherently dangerous work, or that the jury would have been warranted in so holding, the general law seems to be that the employer must, by his contract, impose the duty upon the independent contractor to take the necessary special precautions. Restatement, Torts, §413(a), p. 1119. As has been seen, footnote 1, *supra*, the contract made it the duty of the contractor to take safety precautions, and specifically to "provide and have available at all times for use by Contractor's employees engaged in the performance of the work herein undertaken, all safety appliances needed for the maximum protection of Contractor's employee's [sic] against injuries."

[5] Appellants urge, however, that the employer's duty, in cases of inherently dangerous work, is nondelegable. As

[7] Otherwise, the "prediction" of which Dean Prosser takes note, that "* * * ultimately the 'general rule' will be that the employer is liable for the negligence of an independent contractor," Prosser on Torts, 2d ed., p. 358, would be close to present reality in Texas.

to third persons, that is true,[8] but it has been observed that "* * * the duties which a contractee owes to employees of the independent contractor are less than those owing to third persons." 57 C. J. S. Master and Servant, §600, p. 372.

The reasons for the rule of nonliability for the torts of an independent contractor have been well stated in 27 Am. Jur., Independent Contractors, §27, pp. 504, 505, 506:

> "* * * This rule of the nonliability of an employer is based upon the theory that the characteristic incident of the relation created by an independent contract is that the employer does not possess the power of controlling the person employed as to the details of the stipulated work, and it is, therefore, a necessary judicial consequence that the employer shall not be answerable for an injury resulting from the manner in which the details of the work are carried out by the independent contractor. The general rule has also been said to rest upon the ground that a contractor, pending the performance of the work, is, to a certain extent, substituted for the person for whom the work is to be performed. However, the real basis for the rule seems to be public policy."

[6-8] We must look to the Texas courts for statements of the public policy of that State. It was held in Humble Oil & Refining Co. v. Bell, Tex. Civ. App., 180 S. W. 2d 970, 975, 976, that the rule that an employer of an independent contractor is liable to third persons for negligence of the independent contractor in the performance of work

[8]For pertinent example, the comment to Section 416 of the Restatement of Torts contains the following:

"* * * However, the fact that the contract contains express stipulations for the taking of adequate precautions and that the contractor agrees to assume all liability for harm caused by his failure to do so, does not relieve his employer from the liability stated in this Section." Restatement of Torts at pp. 1128-1129.

inherently dangerous does not extend to employees of the independent contractor, and that holding has been twice followed by this Court. Union Tank & Supply Co. v. Kelley, 5 Cir., 1948, 167 F. 2d 811, 816; Cagle v. McQueen, 5 Cir., 1952, 200 F. 2d 186, 190. Appellants vigorously urge that such is no longer the law of Texas. The same principle was, however, reaffirmed in the very late case of Nance Exploration Co. v. Texas Employers' Ins. Ass'n, Tex. Civ. App. 1957, 305 S. W. 2d 621, 627, 628. We must conclude that the fact, if it be a fact, that the work was inherently dangerous would not impose liability upon Gulf.

[9] In a supplemental brief, filed after the oral argument, appellants ask that we review certain rulings of the district court on the admissibility of evidence. Those rulings were not included either in the statement of points on which the appellants intended to rely on appeal that were served on the appellee,[9] or in the specifications of error in appellants' original brief.[10] In our opinion, the rulings complained of clearly do not constitute plain error affecting substantial rights and would not require a reversal of the judgment in the interest of justice. We therefore forego reviewing the rulings on admissibility.

[10] We agree with the district court that the evidence in this case would not sustain a finding that Gulf owed any duty to Sword to inspect, and to supervise the operation of, the machinery furnished by Sword's employer. The judgment is therefore

Affirmed.

[9]Under Rule 75(d), Federal Rules of Civil Procedure, 28 U.S.C.A.
[10]Required by Rule 24, 2(b) of the Fifth Circuit, 28 U.S.C.A.

APPENDIX B

ORDER RECALLING AND STAYING JUDGMENT ISSUED AS MANDATE FILED:—

June 26, 1958.

In the

United States Court of Appeals

FOR THE FIFTH CIRCUIT.

No. 16357

CEPHAS E. SWORD and HOUSTON FIRE AND CASUALTY INSURANCE COMPANY,

Appellants,

versus

GULF OIL CORPORATION,

Appellee.

ON CONSIDERATION OF THE PETITION of Appellants for recall and stay of judgment issued as mandate in the above numbered and entitled cause, to enable appellants to apply for and to obtain a writ of certiorari from the Supreme Court of the United State, IT IS ORDERED that the judgment issued as mandate to the Clerk of the United States District Court, at Pecos, Texas, on May 12, 1958, be recalled and stayed for a period of thirty days, the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within thirty days from

the date of this order there shall be filed with the clerk of this court the certificate of the clerk of the Supreme Court that certiorari petition and record have been filed. It is further ordered that the clerk shall issue the judgment as mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the expiration of thirty days from the date of this order, unless the above-mentioned certificate shall be filed with the clerk of this court within that time.

/s/ RICHARD T. RIVES
United States Circuit Judge

June 26, 1958.

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No. 170

In the

Supreme Court of the United States

OCTOBER TERM, 1958

CEPHAS E. SWORD and HOUSTON FIRE AND CASUALTY INSURANCE COMPANY,
Petitioners,

v.

GULF OIL CORPORATION,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

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No. 170

In the

Supreme Court of the United States

OCTOBER TERM, 1958

CEPHAS E. SWORD and HOUSTON FIRE AND CASUALTY INSURANCE COMPANY,

Petitioners,

v.

GULF OIL CORPORATION,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals (Appendix "A" of Petition) is reported at *251 F. 2d 829.*

JURISDICTION

The jurisdictional requisites are adequately set forth in the petition.

QUESTIONS PRESENTED

1.

Whether the Court of Appeals in this case followed the applicable substantive law of Texas.

2.

Whether determination by the Courts, rather than a jury, of the existence or non-existence of legal duties claimed to rest upon Respondent, violates the Seventh Amendment to the Constitution of the United States.

3.

Whether the doctrine announced in *Slocum v. New York Life Insurance Company, 228 U. S. 381*, prevents the entry of judgment in this case.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent provisions of the Constitution of the United States (Seventh Amendment thereto) and the statute involved, the Rule of Decision Act (28 U. S. C. Section 1652), are set forth in the petition, at page 4.

STATEMENT

Without Dispute:

Respondent was the owner of an oil and gas lease covering minerals beneath "flat ranch land" (R. 153) in Upton County, Texas. Wanting to minerally explore this lease-

hold, it contracted with Hall & Stewart Drilling Company for the drilling of an exploratory well (R. 139-151). The contract provided that Hall & Stewart Drilling Company should furnish all safety devices and appliances for the safety of workmen (R. 40), as well as furnish the workmen, derrick, engines, motors and machinery (R. 146), required for the drilling of the well. The drilling work was to be performed and supervised by Hall & Stewart (R. 140) and the work involving the accident was being done under the supervision and control of Hall & Stewart (R. 54, 101, 157). It was stipulated in trial that Hall & Stewart "were independent contractors" (R. 134).

Under the contract, Gulf delivered possession of the premises to Hall & Stewart (Stipulation, R. 172), who commenced drilling operations and prosecuted the same to the 13,100-foot depth (R. 154, 155) when accident happened.

On the day of accident (as on all other days), Hall & Stewart's equipment was in use, and it was Hall & Stewart's properties which became involved in the events of accident (R. 55, 68, 99). No equipment belonging to Gulf was in any manner involved in the mishap (R. 54, 90, 110, 155, 157).

Petitioner was an employee of Hall & Stewart (R. 15) and was working under the supervision of his independent contractor-employer, Hall & Stewart, during all the time involved in his accident (R. 54, 101, 157). He was not working under the supervision or direction of any Gulf

employee (R. 54). None of Gulf's men were even present (R. 34). Respondent's connection with the accident is that it furnished the oil and gas leasehold estate and contracted with an independent contractor for the drilling of a well (R. 158).

The accident happened in morning daylight (R. 35). Petitioner's driller had "cut the drilling off" because of a pressure failure (R. 17). Petitioner's driller had "ordered" (R. 18) a check for air leaks and Petitioner, a motorman, went between his motors and behind the draw-works, checking his motor clutches (R. 18). Starting back toward the driller's position (R. 42, 47), Petitioner "took a short-cut across the top of the machinery rather than going around the draw-works to get where" he "wanted to go" (R. 41, 42). No Gulf man had told him to do what he was doing when accident happened (R. 54). Ordinarily, in going from where he was to where he wanted to go, Petitioner said he would have made the trip around the draw-works and not over machinery (R. 53).

On his short-cut across the top of the machinery (R. 41), Petitioner was on top of a chain guard compound (R. 45) and had "started over the master clutch" (R. 49). "I had mud on my feet * * * my foot slipped off of there and the suction from the master clutch, the motors had been revved up and turning so fast it sucked my leg back into the master clutch" (R. 23); "I put my left foot over that thing to put my left foot over there and it slipped off" (R. 52).

The master clutch was enclosed on all but one of its sides (R. 70), the open side facing the chain guard compound "about a foot away" (R. 70). The intervening area was not a walk-way (R. 71). The open side had no mesh guard on it (R. 71).

Gulf had made no inspection of Hall & Stewart's machinery to determine the presence or lack of a safety guard (R. 158).

In the pleadings on which the case was tried, it was alleged that Gulf was guilty of negligence (1) "in failing to make an inspection of the rig floor, particularly the master clutch, to see if the same was properly guarded with a guard" (R. 13); (2) "in failing to warn plaintiff of the absence of the guard over the master clutch" (R. 13); and (3) "in failing to provide a safe place to work" (R. 13).

The case was tried before a jury on fully developed facts. At the close of all evidence in the case, Respondent made its motion for instructed verdict (R. 204), which was then overruled (R. 227), and, after argument of counsel, the Court gave his oral charge to the jury. Before the jury commenced its deliberations on the case, the Court withdrew from jury consideration the part and portions of the charge which represented Gulf's defenses and those which its counsel had emphasized in jury argument (R. 202, 203). With the defensive side of the case withdrawn from jury consideration, the jury was unable to unanimously agree upon a verdict. It was then discharged. Respondent after-

wards presented its motion for judgment, based upon the grounds of its motion for instructed verdict, and presented its motion for summary judgment. It was in grant of these motions (R. 228) that the judgment was entered in favor of Respondent (R. 226-228).

ARGUMENT

The Trial Court and Court of Appeals Both Correctly Applied the Applicable Substantive Law of the State of Texas in Determining that Respondent Owed to Petitioner No Legal Duty that Might Have Been Breached

The only thing furnished by Respondent to Hall & Stewart, and its employees, including Petitioner, was the possession (Stipulation, R. 172) of a piece of "flat ranch land" (R. 154). The dangerous condition giving rise to the accident in suit was in the drilling rig and its equipment belonging to and delivered by Hall & Stewart to the location after Hall & Stewart had taken possession of the drillsite from Respondent. Of this rig and its equipment Gulf never had either possession or control, and no claim has been made that it had taken over either possession or control.

Having thus surrendered possession (Stipulation, R. 172) of the safe "flat ranch land" embracing the drillsite, no duty to Petitioner and no liability to Petitioner could arise against Respondent by reason of its oil and gas leasehold estate. *Restatement of Torts, Sec. 354.* This is so plain

that Petitioner has never at any stage of the proceedings in this case seriously suggested the contrary.

Instead, Petitioner seeks to impose a duty upon Respondent like those of an occupier of land on the theory that Respondent enjoyed a status such as that of the independent contractor in *Smith v. Henger (Tex. Sup. Ct., 1950), 226 S. W. 2d 425*, or, the supplier of chattels and director of drilling operations in *Roosth & Genecov Production Co. v. White (Tex. Sup Ct., 1953), 262 S. W. 2d 99.*

Failing in this, Petitioner seeks to establish a duty of care in exercising a supposed reserved right of coordination under *Section 414* of the *Restatement of Torts.* Finally, with all else failing, Petitioner seeks to show that the drilling of an oil well is "inherently dangerous work" and that Respondent, as the employer of an independent contractor hired to do this "inherently dangerous work," as a matter of public policy is liable to third persons for injuries arising from the conduct of this dangerous work, and that Petitioner is such a third person who can claim the benefits of the doctrine.

The doctrine of and duties announced in *Smith v. Henger (Tex. Sup. Ct., 1950), 226 S. W. 2d 425*, clearly rest upon control of the premises involved. *226 S. W. 2d 425, 430, 431.* In this case, possession and control of the rig, its engines and the clutch guard, as well as all other equipment and the drillsite, were in Hall & Stewart, Petitioner's employer, and were not in Respondent. No claim to the con-

trary has ever in this case been made. All that Gulf had was the privilege, under its contract, to inspect the work performed by Hall & Stewart, to see if the work was being done according to the terms of the contract (Ph. 19 of the drilling contract, R. 142). Without dispute, the evidence also shows not a single attempt in any way on the part of Gulf to exercise any possession or control of the drillsite or rig and equipment thereon, including the equipment involved in accident, after surrender of the drillsite to Hall & Stewart.

Roosth & Genecov Production Company v. White (Tex. Sup. Ct., 1953), 262 S. W. 2d 99, likewise imposes no duty upon Respondent. This case involved the duties of a supplier of defective chattels who actually directed the drilling work. If Gulf, instead of Hall & Stewart, had furnished the rig and equipment involved in this accident and controlled and directed the work, then the *Roosth* case could well be authority for the existence of a duty to Petitioner on the part of Respondent. All Respondent furnished in this case, however, was a safe piece of "flat ranch land" (R. 154), in no way responsible for or connected with the accident. Respondent did not have possession of the location or the equipment thereon (Stipulation, R. 172), was not supervising or directing the work (R. 54), and had only the privilege and not the duty, under the contract, to inspect the work performed by Hall & Stewart (Ph. 19 of the drilling contract, R. 142).

Regarding Petitioner's next to last contention, *Section 414* of the *Restatement of Torts* offers Petitioner no help. Petitioner concludes for himself that under the drilling contract involved (R. 139-142), Respondent reserved unto itself the status of a "coordinator," hoping to come under the theory of liability set forth in *Section 414* of the *Restatement*, as illustrated in *Berquist v. Penterman (Superior Court of N. J., 1957), 134 Atl. 2d 20.* A reading of the contract reveals that it is not subject to any construction remotely resembling Petitioner's conclusion. Even if the Court assumed such right of coordination, however, liability can nevertheless be predicated only on negligence in exercising the retained control. In this case there is not a word of pleading, and not a scintilla of evidence that this accident was caused or affected in any way by the manner in which Respondent exercised this so-called reserved right of "coordination." In fact, Petitioner's first suggestion of this theory came on motion for rehearing in the Court of Appeals.

Lastly, the "inherently dangerous work" theory can get Petitioner nowhere. In the first place, there is neither pleading nor proof that the work here involved was inherently dangerous. Secondly, the work of drilling an oil well is probably not "inherently dangerous work." See *Restatement of Torts, Section 427a*, and *Roosth & Genecov Production Company v. White (Tex. Sup. Ct., 1953), 262 S. W. 2d 99, 102.*

Even if the work were "inherently dangerous," however, it is plain, under the law of Texas, that Petitioner is not

a person to whom the benefits of the doctrine extend, that is, he is not a third person to whom a contractee of an independent contractor is liable for damages arising out of the performance of "inherently dangerous work." In Texas, the doctrine does not inure to the benefit of an employee of the independent contractor engaged in doing the "inherently dangerous work." *Humble v. Bell (Tex. Civ. App., 1943), 180 S. W. 2d 970 (error refused for want of merit, by the Texas Supreme Court, 181 S. W. 2d 569); Cagle v. McQueen (C. A. 5, 1953), 200 F. 2d 186; Nance Exploration Co. v. Texas Employers' Ins. Ass'n. (Tex. Civ. App., 1957), 305 S. W. 2d 621, 627, error refused, no reversible error,* rehearing on application for writ of error denied July 23, 1958. The cases of *Lloyd v. Herrington (Tex. Sup. Ct., 1943), 182 S. W. 2d 1003,* and *Texas Electric Service Co. v. Holt (Tex. Civ. App., 1952), 249 S. W. 2d 664, error refused, no reversible error,* cited by Petitioner, do not hold to the contrary. In fact, in both cases relied on by Petitioner, judgments for plaintiffs were even reversed and rendered for the defendant employers of independent contractors.

Thus, the Court of Appeals properly and correctly held that Respondent owed no legal duty to Petitioner that Petitioner has in any manner attempted to plead and show was or could have been in any manner breached, and that Petitioner's efforts to place on Gulf the duties owed him by his employer, Hall & Stewart, must fail. Accordingly, under the law of Texas, Petitioner can never have final judgment against Respondent in this case.

Determination by the Courts, Rather than by a Jury, of the Non-Existence of Duties Claimed to Rest Upon Respondent Does Not Violate the Seventh Amendment of Our Constitution

It is to be noted that Petitioner, in his petition, has not pointed out in any manner wherein Petitioner was denied his constitutional right to trial by jury. It is just as easy to show that such rights were not violated in this case, however, as it is for Petitioner to state his conclusion.

The rulings of both the trial Court and the Court of Appeals were on lack of existence of legal duties owing by Respondent to Petitioner that were alleged to be breached or that might have been breached in this case. Clearly, no attempt has ever been made by the Courts in this case to determine whether there was or was not, in fact, a breach of existing duties, or whether any such breach was a cause or could have been a cause of accident.

Of course, an indispensable element of actionable negligence is the existence of a duty. *38 Am. Jur. 651, 652; Northern R. Co. v. Page, 274 U. S. 65.*

Certainly, the determination of the existence or non-existence of claimed duties on which to predicate claims of negligent breach is for the Courts to decide, and not for juries to determine as matters of fact. *City of Bryan v. Jenkins (Tex. Civ. App., 1952), 247 S. W. 2d 925, error refused, no reversible error; New York & Porto Rico SS Co. v. Guanica Centrale (C. C. A. N. Y., 1916), 231 Fed.*

820; Fuller v. Citizens Nat. Bank (C. C. Ohio, 1882), 15 Fed. 875; 65 C. J. S. Negligence, Sec. 287, p. 1233; 30-B Tex. Jur. 175-177.

Inasmuch as there is a total lack of any legal duty owed by Respondent to Petitioner that has been shown or correctly suggested to exist, after the facts of the case had been fully developed at a full and complete trial, there was nothing to submit to the jury. Accordingly, there was no denial of trial by jury as guaranteed by the Seventh Amendment to the Constitution. The right of trial by jury extends only to questions of fact that remain to be settled. See *Tompkins v. Erie R. Co. (C. C. A. 2, 1938), 98 F. 2d 49 (cert. denied, 305 U. S. 637, rehearing denied, 305 U. S. 673).*

Respondent in this case has shown that it was entitled to a directed verdict which clearly does not violate the Seventh Amendment to the Constitution, though it does deny jury verdict. See *Galloway v. United States, 319 U. S. 372, 394.*

The Granting of Respondent's Motion for Summary Judgment Based on a Full and Complete Transcript of All of the Evidence Developed at a Full and Complete Trial of the Case on the Merits Was Proper

Petitioner's first complaint of the procedures used in this case comes in this Court. Now, he seeks to have this Court find, in some manner, that *Slocum v. New York Life*

Insurance Company, 228 U. S. 381, prevents the trial Court from granting Respondent summary judgment and requires that a new trial be ordered.

The *Slocum* case, insofar as this case is concerned, only involved the circumstance of the trial Judge substituting his opinion of the evidence for that of the jury, in overturning the jury's verdict and granting judgment for the Defendant, this Court holding that having overturned the verdict, the trial Court could only grant a new trial. The *Slocum* case did not in any way involve a question such as is here presented. Here, we are not concerned with how the evidence might be construed by reasonable men in arriving at negligence and proximate cause findings, but rather, we are dealing with the essential underlying proportions of law that no duty existed on Respondent's part toward Petitioner, on which to predicate a finding by anyone of a breach. As pointed out in *Galloway v. United States, 319 U. S. 372, 394*, the *Slocum* case does not prevent the direction of a verdict when the law disposes of the case.

Respondent has here followed the summary judgment provisions of the *Federal Rules of Civil Procedure, Rule 56*, and is entitled to the same under the standard set forth by this Court in *Sartor v. Arkansas Natural Gas Corporation, 321 U. S. 620, 627*, wherein the Court noted that summary judgment is authorized where a moving party is entitled to judgment as a matter of law, where it is quite clear what the truth is, and that no genuine issue of fact remains for trial. These requirements have been satisfied and the procedures involved present no error.

THERE IS NO CONFLICT IN THE DECISIONS

At page 11 of his petition, Petitioner says the decision below conflicts with the decision in *McKee v. Patterson (Tex. Sup. Ct., 1954), 271 S. W. 2d 391.* At page 16 of the petition, he says the decision in this case conflicts with nine other cases. These statements are not true.

In *McKee v. Patterson (Tex. Sup. Ct., 1954), 271 S. W. 2d 391,* the Court reversed and rendered judgment for the defendant-general contractor, holding that the dangers there involved, as a matter of law, were open and obvious to the plaintiff and that, accordingly, the general contractor who controlled the premises and operations owed no duty to the injured plaintiff, either to provide a safe place to work or to warn of dangers. Here, Hall & Stewart controlled the premises and operations involved, and not Respondent.

In *Gulf Oil Corporation v. Wright (C. A. 5, 1956), 236 F. 2d 46,* Gulf was performing the functions it had reserved unto itself by its contract, which functions resulted in the death involved. Here, Hall & Stewart, and not Respondent, was performing and controlling the operations and its own instrumentalities involved in accident, and not Respondent.

In *Sun Oil Company v. Pierce (C. A. 5, 1955), 224 F. 2d 580,* the defendant was in control of the drilling rig, directing and controlling the operations thereon. Here, Hall & Stewart, and not Respondent, was in control of the drilling rig and its operations.

In *United Production Corporation v. Chessir (C. A. 5, 1939), 107 F. 2d 850*, the defendant was in possession of and was operating the defectively equipped drilling rig involved. Here, Hall & Stewart, and not Respondent, furnished, was in possession of and operating the defective equipment.

In *Amacker v. Skelly Oil Company (C. A. 5, 1943), 132 F. 2d 431*, the defendant possessed and controlled the storage tank involved, and directed the act which brought about injuries. Here, Hall & Stewart, and not Respondent, was possessed of and controlled the properties involved in accident, and directed the activities out of which the accident arose.

Roosth & Genecov Production Company v. White (Tex. Sup. Ct., 1953), 262 S. W. 2d 99, involved a defendant who supplied defective equipment and was in charge of and directed the operations out of which accident occurred. Here, Hall & Stewart, not Respondent, furnished the defective equipment and directed and controlled the operations out of which accident occurred.

In *Smith v. Henger (Tex. Sup. Ct., 1950), 226 S. W. 2d 425*, the defendant had control of the premises involved and the operations thereon. Here, Hall & Stewart, and not Respondent, had possession and control of the premises involved.

Texas Electric Service Company v. Holt (Tex. Civ. App., 1952), 249 S. W. 2d 664, error refused, no reversible error, involved an affirmative action of alleged negligence on the part of defendant. There is no suggestion in this case that

Respondent was actively or affirmatively negligent in any manner.

Wright v. Tudor City Twelfth Unit, Inc., et al., 12 N. E. 2d 307, involved a defendant in possession of the premises where injury occurred and an injured plaintiff, who was a member of the general public, and not an employee of an independent contractor employed to do the work out of which the accident arose, as in this case.

In *Phillips Petroleum Company v. Gibson, 232 F. 2d 13, 1 L. Ed. 2d 71*, the defendant had furnished the kerosene barrel that exploded. Here, Gulf furnished nothing, except the drillsite on which Hall & Stewart placed their defective equipment .

CONCLUSION

The Courts below have properly handled and properly disposed of this case. Accordingly, it is respectfully submitted that the petition for writ of certiorari be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Copies of the foregoing were deposited in the United States mail at Midland, Texas, each in properly stamped envelopes addressed to respective counsel for Petitioner, viz.: John J. Watts, Esq., at his post office address, P. O. Box 1031, Odessa, Texas; W. O. Shafer, Esq., at his post office address, P. O. Box 1552, Odessa, Texas; and Warren E. Miller, Esq., Suite 1012, Barr Building, 910 Seventeenth Street N.W., Washington 6, D. C., this the day of August, 1958.

THIS I CERTIFY:

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No. 170

In the

Supreme Court of the United States

OCTOBER TERM, 1957

CEPHAS E. SWORD and HOUSTON FIRE AND CASUALTY INSURANCE COMPANY,

Petitioners,

v.

GULF OIL CORPORATION,

Respondent.

PETITIONERS' BRIEF IN REPLY TO BRIEF OF RESPONDENT

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PETITIONERS' BRIEF IN REPLY TO BRIEF OF RESPONDENT

To the Honorable Supreme Court of the United States

1.

OPINIONS OF THE COURT BELOW

The opinion of the Court of Appeals is reported at *251 Fed. 2d 829.*

2.

JURISDICTION

The judgment of the Court of Appeals was entered January 24, 1958. Rehearing was denied on April 17, 1958.

The jurisdiction of this Court is invoked under Article 28, U. S. C., Sec. 1254(1).

SPECIFICATIONS OF ERROR

I.

Whether a Court of Civil Appeals may, in rendering its judgment in a diversity case, apply substantive law which is in direct conflict with the law of the State from which the case was appealed as declared by the Supreme Court of the state?

II.

Whether a Circuit Court of Appeals may affirm the judgment of the trial Court rendering a summary judgment in a case where the evidence raised issues of fact for the jury without denying to petitioner a trial by jury as required by the Seventh Amendment to the Constitution of the United States?

III.

Whether the United States Supreme Court will permit local law as determined by a Circuit Court of Appeals to control over the right of trial by jury as guaranteed by the Seventh Amendment to the Constitution of the United States?

IV.

Whether the Court erred in holding that under the law of Texas that the doctrine of inherently dangerous work does not inure to the benefit of the employee of the contractor?

V.

Whether the Court erred in holding that the trial court was correct in entering its summary judgment for the appellee Gulf Oil Corporation, in this cause?

VI.

Whether the Court erred in granting a motion for summary judgment after the motion for instructed verdict had been overruled by the Court and after the jury had failed to reach a decision. A new trial should have been ordered by the trial court?

VII.

Whether the Court erred in holding that, under the circumstances here involved, that it was not the duty of Gulf Oil Corporation to inspect the work as it progressed to see if they had furnished reasonably safe place to work to their invitee, Sword?

This case is controlled by Federal law and the Circuit Court erred in attempting to apply the law of Texas.

The brief of the Respondent in this case fails to discuss the Federal law that is clearly in point with the fact situation here involved, to-wit, the decision of Judge Hand in

Halecki v. United New York and New Jersey, S. H. P. Ass'n, 251 Fed. 2d 708. In this case, Judge Hand held, in effect, that the duty was upon Gulf, as applied to this case, even though the work was let out to a sub-contractor, to exercise "reasonable care to ascertain the method and manner in which the concessionaire or independent contractor carries on his activities, not only at the time when the concession is let, or the contractor employed, but also during the entire period in which the concessionaire or contractor carries on his activities."

This case standing alone is a complete reply to the numerous contentions urged by the Respondent. This is particularly true since this case must be decided, not under Texas law, as was done by the Fifth Circuit in this case, but *must be decided under the Federal law in order that the rights of the Petitioners under the Seventh Amendment to the Constitution of the United States can be preserved.*

Recent decisions in support of the Petitioners' Contention as set out in our Petition For Writ of Certiorari on this point are *Allen v. Matson Navigation Company, 255 Fed. 2d 273.* In this case, the Court said on Pg. 281:

> "We also note that while that circumstance would not in our opinion alter the result here, yet 'the sufficiency of certain evidence to raise a question of fact for the jury * * * should not be controlled by state law." 5 Moore's Federal Practice, 2d ed., Sec. 38.

In Footnote 11, Pg. 282, the Court cited the following additional cases with this comment:

> 11. Pogue v. Great Atlantic & Pacific Tea Co., 5 Cir., 242 Fed. 2d 575, 582: 'The kind of jury trial to

which the parties are entitled in Federal Courts under Rules 38 and 39 of the Federal Rules of Civil Procedure, 28 U.S.C.A., is that preserved by the Seventh Amendment to the Constitution, to which the doctrine of Erie Railroad Co. v. Tompkins, 304 U. S. 64, 58 S. Ct. 817, 82 L. Ed. 1188, is of course subservient.' Wright v. Paramount-Richards Theatres, 5 Cir., 198 Fed. 2d 303, 305; Reuter v. Eastern Air Lines, 5 Cir., 226 Fed. 2d 443, 445; Reynolds v. Pegler, 2 Cir., 223 Fed. 2d 429, 433, 434.

These cases may explain the extent to which the Supreme Court has indicated it is prepared to go in sustaining the sufficiency of the evidence to support a jury verdict in cases where the inferior federal courts have set verdicts aside. See for example the following, none of which are F. E. L. A. cases: Williams v. Carolina Life Insurance Co., 5 Cir., 210 Fed. 2d 477, reversed at 348 U. S. 802, 75 S. Court. 30, 99 L. Ed. 633; Atlantic Coast Line Railroad Co. v. Swafford, 5 Cir., 220 Fed. 2d 901, reversed at 350 U. S. 807, 76 S. Ct. 80, 100 L. Ed. 725; Eastern Air Lines, Inc. v. Union Trust Co., 95 U. S. App. D. C. 189, 221 Fed. 2d 62, reversed at 350 U. S. 907, 76 S. Ct. 192, 100 L. Ed. 796; Phillips Petroleum Co. v. Gibson, 5 Cir., 232 Fed. 2d 13, reversed at 352 U. S. 874, 77 S. Ct. 16, 1 L. Ed. 2d 77.

It is therefore quite apparent that the Fifth Circuit erred in deciding this case under what they claimed to be the law of Texas and that the Petition For Writ of Certiorari should be granted and the law as determined in the *Halecki* case by the great, distinguished Judge Hand should be applied.

In this connection, however, we would like to point out that the Fifth Circuit has misconstrued Texas decisions relative to the controlling points here involved.

5.

Under Federal law, as well as Texas law, the doctrine of inherently dangerous work does inure to the benefit of the employee of the independent contractor who occupies the status of invitee.

No better statement of the Federal law on this matter can be found than the opinion in American Pacific Whaling Co. v. Kristensen, 93 Fed. 2d 17, in which the Court said:

> "It eliminated entirely the exception to the rule, i.e., that the employer is not relieved from imputation of negligence in cases presenting the principle of 'dangerous instrumentalities.' If the work done by an independent contractor has in it an inherent element of danger, and, through negligence of the contractor, proper provision has not been taken to guard against such danger, such negligence is imputed to the employer. If the work 'from its nature, is likely to cause danger to others, there is a duty on his part to take all reasonable precautions against such danger, and he does not escape from liability for the discharge of that duty by employing the contractor, if the latter does not take these precautions'." Penny v. Wimbledon Urban District (1899) 2 Q.B. 72, 47 Week. Rep. 565. See, also, St. Paul Water Co. v. Ware (1872), 16 Wall. 566, 21 L. Ed. 485; Jacob Doll & Sons, Inc. v. Ribetti (C. C. A. 3, 1913) 203 F. 593; Ohio Southern R. Co. v. Morey (1890) 47 Ohio St. 207, 24 N. E. 269, 7 L. R. A. 701; Richman Bros. Co. v. Miller (1936), 131 Ohio St. 424, 3 N. E. 2d 360; City & Suburban Ry. Co. v. Moores St. Rep. 345.

The Federal law is supported by the great weight of authority throughout America. No stronger statement of the rule can be found than the recent case of *Johnson v. Nicholson, 324 Pac. 2d 307*, in which the Court of Appeals for the

Second District of California on April 16, 1958, on many points squarely in point with the questions involved in this case, held on Pg. 314 as follows:

> "Liability for carelessly handling dangerous instrumentalities arises from failure to use due care, and such failure arises when the *circumstances show* that the actor *had reason to know that his act was likely to produce* injury to any person in the lawful pursuit of his own business and exercising reasonable care. When human life is at stake the rule of due care and diligence requires that without regard to difficulties or expense *every precaution be taken reasonably to assure the safety and security of any person* lawfully coming into the immediate proximity of the dangerous agency or device which is a peril to others. One who causes the use of a dangerous instrument in a negligent manner, or under such circumstances that he has reason to know it is likely to produce injury, is responsible for the natural and probable consequences of his act to any person not at fault."

6.

The cases are in conflict.

The opinion by the Fifth Circuit in *Holt v. Texas-New Mexico Pipeline Co., 145 Fed. 2d 822*, dramatically presents a conflict existing between this case and the cases set out in the Petition For Writ of Certiorari wherein the Court said, speaking through Mr. Justice Holmes, on Pg. 863, as follows:

> "Appellant contends that these facts made out a case for determination by the jury under two well-settled legal principles: (1) That an owner or occupant of premises owes a duty to an invitee to maintain such premises in a reasonably safe condition; and (2) that where one secures the performance of work that is intrinsically dangerous, however skillfully it may be

performed, the one in whose behalf the work is done is charged with the highest degree of care to prevent injury, which duty may not be delegated to another.

"These principles have long been recognized in Texas."

They cite in support of the recognition of these principles of law, under Footnotes 1 and 2, the following cases, among which are several of the cases which Petitioner set forth as representing a conflict which Respondent's counsel has seen fit to attempt to deny and to differentiate:

Footnotes 1 and 2 of the *Holt* decision cites:

"1. Cameron Mill & Elevator Co. v. Anderson, 98 Tex. 156, 81 S. W. 282, 1 L. R. A., N. S., 198; Galveston-Houston Electric Ry. Co. v. Reinle, 113 Tex. 456, 258 S. W. 803; Bustillos v. Southwestern Portland Cement Co., Tex. Comm. App., 211 S. W. 929; Atex Construction Co. v. Farrow, Tex. Civ. App., 71 S. W. 2d 323; El Paso Electric Co. v. Buck, Tex. Civ. App., 143 S. W. 2d 438; Loyd v. Herrington, Tex. Civ. App., 178 S. W. 2d 694, 700; 18 R. C. L. 542; 27 Am. Jur. 517.

"2. Crow v. Continental Oil Co., 5 Cir., 100 F. 2d 292; United Production Co. v. Chesser, 5 Cir., 107 F. 2d 850; Amacker v. Skelly Oil Co., 5 Cir., 132 F. 2d 431; Galveston-Houston Electric Ry. Co. v. Reinle, 113 Tex. 456, 258 S. W. 803; Hozian v. Crucible Steel Casting Co., 132 Ohio St. 453, 9 N. E. 2d 112 A. L. R. 333, and cases cited."

It is quite obvious that the holding in the above cited cases holding that the owner-occupant of premises owes a duty to an invitee, such as Petitioner, to maintain such premises in a reasonably safe condition is in conflict with the holding in this case wherein the Fifth Circuit has held for the first time that this rule of protection for the in-

vitee applies only where the invitor, or employee of the independent contractor, has actual control of the work and then they go further and say that if they do have actual control of the work then there can be no third party suit maintained since the exclusive remedy is under the Workmen's Compensation Act of Texas. If such had been the law in the Federal Courts or in Texas, no recovery could have been had in all of the cases listed above or set out in our Petition For Writ of Certiorari as conflicting with the decision in the case at bar.

It will be observed also that the *Holt* case (which was a suit for an employee of an independent contractor against the Texas-New Mexico Pipeline Co., the owner-occupant) recognizes that the doctrine of intrinsically dangerous work does inure to the benefit of the employee of the independent contractor.

The Fifth Circuit, expressly decided this very point in *Sun Oil Co. v. Kneten, 164 Fed. 2d 806, on Pg. 809*, in a decision in which Mr. Justice Hutcheson participated, when they said:

> "It is also the law in Texas that when the work contracted for is unusually dangerous in itself as the result of circumstances brought about by the owner or employer in the first instance, and injury proximately results from such conditions, the employer is responsible to servants of the independent contractor for such injuries."

It is difficult for counsel to understand how Respondent can say that there is no conflict between these cases as listed in our Petition For Writ of Certiorari and as cited

in the *Holt* case, supra, and this declaration in the *Kneten* case, supra, and the holding of the Court in this case that the doctrine of inherently dangerous work *does not inure, under any circumstances, to the benefit or for the protection of the employee of the independent contractor.*

The Fifth Circuit in *Union Tank & Supply Co. v. Kelley, 167 Fed. 2d 811*, and *Cagle v. McQueen, 200 Fed. 2d 186*, held contra but we will point out in this connection two things. First, they did so because of the decision in *Humble v. Bell, 180 S. W. 2d 979*, and this decision was entitled to no weight at all on any issue save special employee since the Supreme Court expressly held, in writing its opinion as to why the writ was denied, that it was denied was because Bell was a special employee of Humble. *181 S. W. 2d 569.* Secondly, the Federal Courts hold, as in the *Halecki* case, supra, and others herein cited, that the duty rests upon the employer of an independent contractor to make an inspection of the premises and to oversee and supervise the work of the independent contractor in order that he might perform the duty which he owes the invitee of keeping, furnishing and maintaining the place where he is to work reasonably safe. *It is a hollow thing to say that Gulf owes this duty and then say that if they let out a contract to an independent contractor who doesn't perform it that Gulf is not liable.* The decision by Judge Hand in the *Halecki* case and the others cited cannot be reconciled on this point with this decision as to the duty to make an inspection throughout the work from the time of its inception to the time of its completion.

Since this case is controlled *by Federal law*, it is the duty of this Honorable Court to say which of the Federal decisions control. The holding of the Fifth Circuit in this case *practically abolishes third party cases by holding that actual control must exist before duty and that if actual control does exist, there is no cause of action.*

It is quite obvious that this decision is not only in conflict with great weight of authority throughout America, but is in conflict with all previous decisons of the Fifth Circuit. It is further obvious that this *sudden and mysterious change has been made without just cause, explanation or excuse* and that hundreds of thousands of injured workmen and their widows in the years to come will be denied protection *unless* this Honorable Court adopts the stand which it has taken so many times recently and again holds that in a diversity case where the right of trial by jury is involved, that Federal law must control if it collides with local law in view of the requirements of the Seventh Amendment to the Constitution of the United States.

Judge Cardozo once said:

> "The final cause of the law is the welfare of society. The rule that misses its aim cannot permanently justify its existence. * * * If judges have woefully misinterpreted the mores of this day, or if the mores of their day are no longer those of ours, they ought not to tie in helpless submission, the hands of their successors."

These are great, imperishable and durable truths. And they are recalled to mind whenever we read the speeches of appellate judges, caught in the illicit embrace of the 19th

century, who seek to defend their allegiance to no-duty rules and immunity rules by having us believe that it is not they that speak but the iron voice of stare decisis that speaketh in them. This reminds one of the biographer who wrote of Gladstone that his conscience was not only his guide but his accomplice.

7.

Retrial by a new Jury rather than factual re-evaluation by a Court is a constitutional right of genuine value.

The language of Mr. Justice Black in his famous opinion in *Galloway v. United States, 319 U. S. Pg. 400, 87 L. Ed. 1477,* is exactly as above set out. This is Mr. Justice Black's description of the holding in *Slocum v. New York Life Insurance Co., 228 U. S. 364, 57 L. Ed. 879*

In the *Slocum* case, supra, this Court said:

> "In United States v. Wonson, 20 Fed. Case No. 16, 750, a case decided in 1812 and often cited with approval by this Court, it was said by Mr. Justice Story, after quoting the words of the amendment:
>
> > " 'Beyond all question the common law here alluded to is not the common law of any individual state (for it probably differs in all) but it is the common law of England, the grand reservoir of all our jurisprudence.' "

It is difficult, when one studies the background of the Seventh Amendment and its plain, unmistakable language, to understand how any Court has ever held as has the Fifth

Circuit in this case, that in this Federal case, the law of Texas must be applied and must control.

This Honorable Court has done much in the cases hereinbefore discussed, to correct errors of this nature. We believe the views of this Honorable Court, based upon all recent decisions, coincide with the imperishable words of Mr. Justice Black in the *Galloway* case when he said:

> "The call for the true application of the Seventh Amendment is not to words, but to the spirit of honest desire to see that constitutional right preserved. Either the Judge or the Jury must decide facts and to the extent that we take this responsibility, we lessen the jury function. Our duty to preserve this one of the Bill of Rights may be peculiarly difficult, for here it is our own power which we must restrain."

This Court cited with approval the *Galloway* case in the recent *Schulz v. Pennsylvania Railroad Company* decision, *350 U. S. 523, 100 L. Ed. 668, 76 S. Ct. 608.*

Petitioners here ask this Honorable Court to again live up to these two great promises made in the *Galloway* case, supra, to-wit:

> (1) "Trial by Jury is a fundamental guaranty of the rights of the people and Judges should not search the evidence with meticulous care to deprive litigants of Jury trials.
>
> (2) "Since this is a matter of high constitutional importance Appellate Courts should be alert to insure the preservation of this constitutional right even

> though each case necessarily turns on its peculiar circumstances."

In the *Sword* case we are confronted with a situation wherein after the trial court overruled the motion for directed verdict and submitted the case to the Jury, he, upon the failure of the Jury to agree, re-examined the factual situation, in violation of the Seventh Amendment.

The Fifth Circuit indicates, in Footnote 3 of the *Sword* opinion, that there has been some waiver of Petitioner's rights to complain of the Court's entry of a Summary Judgment after the failure of the Jury to agree.

It is elementary that questions going to the Jurisdiction of a Court cannot be waived even though raised for the first time on appeal.

In the *Hurst* case the Respondent claims that all the Fifth Circuit held, with reference to the Charge of the Court, was that it made it *difficult* for the plaintiff to receive a verdict. This is incorrect. On Page 838 of the *Hurst* opinion, the Court said:

> "It submitted the case to the Jury under instructions, however, which, when followed by the Jury, *precluded* a verdict for the plaintiffs."

This is a flat holding by the Fifth Circuit that had there been a case for the Jury that the Court submitted the case in such a way that the plaintiff couldn't win.

We think the Respondent made a mistake in his Brief and failed to notice this ruling of the Court. Apparently,

the basis for their mistake was the subsequent statement by the Court:

> "There were other instructions which made a verdict for the plaintiffs practically impossible."

In fact, the Trial Court, by his own action in the *Sword* case, in withdrawing certain identical portions of the Charge that had been given in the *Hurst* case, expressly admitted that the *Hurst* Charge was fundamentally erroneous. See Pages 190 to 204, R., *Sword* case.

It is quite obvious, therefore, that as to the *Hurst* case, as a matter of judicial fairness, the Respondent should not be permitted to claim that the Court entered a judgment based on a jury verdict, as well as a Summary Judgment, since it is evident that a new trial would have been granted by the Court based on his own admitted erroneous charge, had the Trial Court not re-examined the facts and entered a Summary Judgment in violation of the Seventh Amendment.

Hence, "special and important reasons," call for the granting of the Writ for Certiorari.

For a complete discussion of the controlling law, reference is here made to the reply brief filed by Petitioners in *Glenn Hubbard Hurst v. Gulf Oil Corporation, No. 188*, now pending before this Honorable Court.

CONCLUSION

WHEREFORE, your Petitioners respectfully pray that this Honorable Court grant the Petition For Writ of

Certiorari to the end that on review, the Fifth Circuit Court may be directed to reverse its judgment.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Copies of the foregoing were deposited in the United States mail at Washington, D. C., each in properly stamped envelopes addressed to respective counsel for Respondent, viz.: William L. Kerr and William Monroe Kerr, 211 First National Bank Bldg., P. O. Box 913, Midland, Texas, on this the day of September, 1958.